In the Supreme Court of the United States.

OCTOBER TERM, 1901.

FRED HARDY, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 502.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

At the August term, 1901, of the district court of the United States for the district of Alaska, second division, held at Unalaska, Fred Hardy was indicted, charged with the murder of Con Sullivan on June 7, 1901, on Unimak Island (R., p. 370). After a motion for a continuance, which was denied (R., p. 16), Hardy was tried, and on September 7, 1901, was found guilty (R., p. 371), and sentenced to be hanged at Nome City on December 6, 1901 (R., p. 375). From this judgment a writ of error was sued out and the execution of the sentence stayed until the third Friday in July, 1902, or until the further order of the Alaska court (R., p. 381).

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Six days were consumed in the trial of the case, and the record covers 384 printed pages. There are 32 assignments of error (R., p. 377). No brief has been filed, and it is difficult to determine upon what opposing counsel will really rely. I have read all the testimony. To my mind it is absolutely convincing upon the point of Hardy's guilt. While the record teems with exceptions, I have been unable to find any ruling which appears to constitute prejudicial error. The exceptions are trivial. It seems to have been the policy of Hardy's counsel to except to everything. Even the few, comparatively speaking, which are relied upon in the assignments of error are hardly worth discussion. Nevertheless, I shall, as briefly as may be, endeavor in the course of the brief to cover them all.

ARGUMENT.

THE DENIAL OF A CONTINUANCE.

The first assignment is that the court erred in overruling the motion for a continuance. I shall discuss this now, not because the court's action needs defense, but because the affidavits submitted throw a sort of introductory light upon the criminal and the case.

The murders were committed on June 7, 1901, and Hardy when arrested on Unimak Island had in his possession some $685. He based his application solely upon his own affidavit (R., p. 2), in which he swore that McIntosh, the captain, and Johnson, the mate of the schooner *Arago*, a fishing vessel in which he came, as a common fisherman, from San Francisco to Unimak Island, would swear that he had left the schooner at

Cape Lapin on June 11, 1901, four days after the murders were committed.

To account for the money in his possession, he swore that he was mustered out of the United States Army at San Francisco about March 28, 1901, and that one Major Whitney, a paymaster, paid him on that day $1,875. He also swore that there were two men whose names were unknown to him, but who were on the Government boat *Pathfinder* somewhere in the Bering Sea, who would testify that they knew him in San Francisco, in March or April, and saw him have over $1,500 in money in his possession.

Hardy wanted a continuance to secure the attendance of these alleged material witnesses.

In opposition, the Government presented the affidavits of nine witnesses (R., pp. 5 to 14), establishing,

First, that Hardy was not an honorably discharged officer of the United States Army, who, on March 28, had been paid $1,875, but that he was a private soldier who had been convicted of theft, dishonorably discharged from the Army, and imprisoned in Alcatraz prison, San Francisco, up to some time in March, 1901.

Second, that instead of leaving the schooner *Arago* on the 11th of June, his conduct and statements showed he had deserted two or three days after one George Aston left the schooner, which was on June 2.

Charles Schoemer (R., p. 10) testified that he was a soldier in the Philippines, and while at Iloilo became acquainted with Hardy, who was then a private soldier. Martin Tricker (R., p. 8), Frank W. Lee (R., p. 9), and William C. Bowen (R., p. 9) all testified that they had

been confined for military offenses at Alcatraz prison, San Francisco, and there became acquainted with Hardy, who was serving a sentence of imprisonment and was known as "Diamond Dick;" that Hardy was released some time in March, 1901.

The testimony of these four witnesses, who, unfortunately for Hardy, happened to be employed on the U. S. S. *Manning*, within reach, showed conclusively that Hardy was committing perjury in swearing that he had been discharged on March 28, had been paid $1,875 by Major Whitney, and that the two men on the *Pathfinder* saw him with $1,500 in his possession.

R. H. WHIPPLE, the United States commissioner, stated that at the preliminary examination on July 30, Hardy made no request for a subpœna for any witness, either for the captain or mate of the schooner *Arago* or any person aboard the Government boat *Pathfinder*, and about that time voluntarily made the following statement (R., p. 6):

> That on or about—I don't know just the exact date—I left the ship the 9th of June. When I reached the shore it was in a distance, I guess, of 10 or 12 miles before I struck the shore. When reaching the shore I saw nobody. Then I went down a distance of about 10 miles farther, where I ran on to three men. I took them to be prospectors or miners. I asked those men if I could get something to eat, and the reply was, "Yes." This was at a place called "The Cove," where a hunter by the name of Charley Rosenberg had a hunting cabin at that place. I went in and ate supper

with these three men, and they asked me who I was and where from. I told them. I stayed with them all that day and that evening, until 2 o'clock next morning. That evening I asked these parties who they were. One of them that seemed to be the boss told me that they had blowed away from a fishing schooner called *The Dove*, and he said his other chums were also off the same vessel.

They had two dories; one blue finished, I believe, not right; the other, a kind of dirty-black color, as far as I can explain. I did not particularly notice.

That morning, about 2 o'clock, I left the cabin where the three parties were; don't know their last names. The oldest one, that seemed to be the boss, was named "Jack;" could not say if a by-name. The other was Jim; never heard name of third person. He was a young fellow. *That morning at 2 o'clock, when I went to leave, I took with me a bag which I supposed belonged to these fellows, and the bag had in it the stuff. It had in it two gold watches and some razors, knives* (don't know now how many), *and some other little trinkets*, and there was by the table where one was sleeping—he had a Winchester and a forty-four revolver, and the oldest fellow had a gun; don't know the kind, and a revolver, and the other had a revolver; don't know the caliber of it. I took with myself when I left the two revolvers and the bag, and these fellows had provisions, blankets, and clothes. One sailor's clothes bag, and they also had a canvas tarpaulin, with something inside wrapped up in a bag.

Those three parties were seen, and stopped at Charley Peterson's, and also left some clothes at Charley Peterson's, as I understood. Charley Peterson is a hunter, and lives close to Marshova; and these people told me that evening, on my asking them how they got away from the ship with all that plunder, one laughed and looked at the other and said, "Ha, you ain't onto the racket—we made a catch." That is all on that subject. I never asked them more.

This is all I care to state.

That subsequently, on August 6, Hardy made another and different statement, as follows (R., p. 7):

That I left the ship *Arago* about the 9th day of June, 1901, with a man by the name of Laurie, Mate Johnson, Mate Clark, and other sailors—some twelve or thirteen men in all—for the purpose of obtaining water.

That at that time there was a tent standing on the black sand of the beach near the mouth of the creek.

That I and Mate Clark went after a fox.

That he (Hardy) made a complaint that he had lost a glove and went back to look for it and did not return.

That this was a pretext made by him for the purpose of getting away from the mate of the boat.

That he traveled northward until he came to Charley Rosenberg's hunting cabin; that he found in said cabin at said time four men, including one George Aston; that he had a talk with Aston; that Aston told him that these four men had robbed some man further down

the shore and then had killed them; that he (Aston) then showed him (Hardy) a watch that bore the inscription "Julia to Florence," or "Florence to Julia."

That these men and Aston had a talk in the cabin in the hearing of Hardy, to the effect that if he, Hardy, was not all right they would plant him;

That Aston told him the next morning that there had been a murder committed on the island, and that "we had better get out;"

That he stopped at said cabin with these parties that night, and on the following day he and Aston entered into an agreement whereby they agreed to steal the property in the possession of these parties that night;

That pursuant thereto he and Aston, about 2 o'clock on the following morning, got up, and while the other men were sleeping stole the rifle, revolvers, watches, and the other things found in his possession when he was arrested, and that he then proceeded to Scott's camp.

J. C. Scott testified (R., p. 11) that on June 7, 1901, with a party of seven prospectors, he was located at Otter Cove, on Unimak Island. On that day one George Aston arrived at the camp, saying that he was a fisherman from the schooner *Arago* and owing to a storm had been blown ashore. Aston remained with the party from the 7th to the 20th of June. On the night of June 17 Fred Hardy came to the camp, carrying a 30–30 Marlin rifle and revolvers.

That the said Hardy told us that he was a fisherman from the fishing schooner *Arago*, and

that some time prior to the 17th day of June, 1901, he, with a person by the name of "Charley" had come ashore for the purpose of hunting for bear; that the captain of the *Arago* had given him a rifle; that he and his companion, "Charley," had gone back into the mountains in search of bear, and when they returned they found that the dory had returned to the schooner; that they then began to make a search for quarters to spend the night when they ran across a cabin that had a sign on it "Sailors' Home" and also a notice to the effect that the within cabin contained goods and provisions, the property of the *Arago* people, and that any wrecked or lost sailors were privileged to enter and take what provisions they needed.

That he, Hardy, and his companion entered the cabin and found upon the bed the skeleton of a man; that said skeleton bore evidence of the flesh having been gnawed off by rats;

That he and his companion took the skeleton and buried it, and went back to the cabin, cooked a meal, and laid some blankets which they found in the cabin on the floor for a bed, preparatory to staying for the night;

That he and his companion laid down on said blankets for sleep, and that during the night his partner got up and left the cabin, and that was the last he ever saw of him;

That this cabin contained provisions and clothing, blankets, and ammunition;

That the said Hardy showed him a roll of greenbacks, stating that he had $1,200; that it was money that he had received when he was

mustered out of the military service of the United States;

That he, Hardy, had been a lieutenant in the United States Army;

That Hardy remained with us on the night of the 19th, and on the following day, accompanied by George Aston, left our camp for the purpose of going to the place where he said these goods were.

CECIL W. NEWTON stated that he was a member of Scott's party, and that the day after Hardy's arrival at the camp he was present when Hardy stated, among other things, that *he left the schooner Arago on the day following the day that George Aston left.* (R., p. 13.)

J. C. SCOTT followed with a second affidavit stating that he was present at the conversation on the 18th of June, when Hardy stated that *he left the fishing schooner the day following the day that Aston left.* (R., p. 13.)

GEORGE H. ASTON (R., p. 14) testified that about the middle of April, 1901, he left San Francisco on the fishing schooner *Arago* for Bering waters. Fred Hardy was on the boat as a fisherman. On the 2d of June he (Aston) left the *Arago* for the purpose of fishing, but a storm coming up, was unable to return to the boat and was at sea during the night of June 2 and until the afternoon of June 3, when he reached the shore of Unimak Island. He remained with a native on June 3 and 4, and with one Rosenberg on June 5 and 6. On June 7 he joined Scott's party and remained with it until the 20th. On the 20th he returned from Lazareef, where he had gone with Collinwood, one of

Scott's party, and found Fred Hardy at the camp. He had a conversation with Hardy that night, and asked him when he left the *Arago*, and he said, "*Three or four days after you did.*"

Hardy stated to Aston that he had come ashore with a watering party and that he and a fisherman by the name of Charley had gone back into the mountains for the purpose of hunting for bear; that they returned to the boat when he, Hardy, made a pretext that he had lost his glove and went to search for it; that when he returned the boat was gone. Hardy then told Aston that the story he had told Scott about finding the goods in the cabin and about finding the remains of a man was not true; that he had found the goods in a tent. At this time Hardy showed Aston a roll of paper money which he said amounted to $1,200 and made the remark "*You know this is more money than I had when I was aboard the Arago.*" Hardy told Aston that he did not want a man by the name of Smedley, who was the cook for the Scott party, to accompany him to where the goods were, because he had told Smedley and others that the goods were in a cabin, and as they were not in a cabin but a tent, it might create some suspicion; so he urged Aston to go to Scott and ask him not to allow Smedley to accompany them to the place where the goods were. Hardy told Aston that they would go to where the goods were, and get a sufficient amount of clothing and provisions to enable them to get off the island and go to some place in civilization, where they would open up a saloon.

Aston states he agreed to go with Hardy, and on June 20 they left Scott's camp for the place where Hardy said the goods were. Three or four miles from Scott's camp, while in their dory, Hardy pulled from his pocket three gold watches, one of them bearing the inscription "From Florance to Julia," or "From Julia to Florance." Aston asked Hardy where he had got his watches, and Hardy told him "*not to be particular and not to ask too many questions.*" (R., p. 15.) He also told Aston that the rifle he had with him was given him by the captain of the *Arago* when he came ashore.

Aston states that Hardy subsequently told him a different story, to the effect that when the party arrived upon the beach to get water that they saw a tent standing upon the beach near a small creek; that while they were still quite a little distance from the shore they heard the reports of guns and saw three men rush out of the tent and go in different directions. That when they arrived at the tent they found everything in a disordered condition. That the .44 colt revolver he had with him he found immediately in front of the tent. That there was some whisky there and that he and the mate drank some of it. That they found fresh bread and that there was in the tent plenty of provisions, blankets, clothing, ammunition, and reloading tools. That he and the mate went to hunt foxes and that he left the mate on the pretext that he had lost his glove. That when he returned the boat was gone. That he stayed in this tent three

or four days, afterwards removed the goods three or four miles to the eastward and remained there three or four days, and then proceeded to Scott's camp.

The court will observe that the story of these witnesses is utterly inconsistent with the truth of Hardy's statement that he had left the *Arago* on the 11th of June and that the captain and mate of the schooner would testify to that fact. Four witnesses testify that he told them he had left two or three days after Aston, and Aston left on the 2d. The different stories he told about how he came into possession of the rifle and revolvers and watches and money show he was utterly unworthy of belief.

The court properly overruled his motion for a continuance. In doing so it acted within its discretion. If anything were needed to confirm the correctness of Judge Wickersham's ruling, it is furnished by the fact that although there has been ample time since the trial to support Hardy's statements as to what the desired witnesses would testify, by affidavits from the persons themselves, and thus present newly discovered evidence as a ground for a new trial, not one line has been furnished. On the other hand, if it were proper, I might state the result of the Government's investigation. We have interviewed the captain and mate of the schooner *Arago*, and we have the entire army record of Hardy, so we know there was and is no witness who will testify to anything set forth in Hardy's affidavit for a continuance.

THE FACTS.

The murder in this case took place on Unimak Island, one of the Aleutian chain, on the Bering Sea side. The crime was dramatic in many features. Hardy had been a private soldier in the Philippines. There he was convicted of larceny and sent to Alcatraz prison. He served his time and was discharged on the 26th of March, 1901. After loafing about San Francisco awhile, he shipped on the fishing schooner *Arago* bound for the Bering Sea. Early in June the schooner was off Unimak Island. On the 2d or 3d of June, Aston, fishing in a dory, was caught by bad weather, spent the night in his dory and the next day had to take to the shore. About three days later, Hardy deserted the ship and sought the shore. He reached the beach a disgraced soldier, trained in the use of the rifle; a discharged convict, prepared to prey on society; a dangerous man. Fatal arrival for four peaceful prospectors then on the shore!

I begin with the testimony of OWEN JACKSON (R., p. 63), the sole survivor of a party of four prospectors who left Seattle for Alaska in a fishing boat, *The Lizzie Colby*, about the 16th of April. This party was made up of Jackson, the two Sullivans (Con and Florence), and P. J. Rooney. All these were men of mature years—Jackson 50, Con Sullivan about 50, Florence Sullivan about 40, and Rooney about 40. They took with them to Unimak Island a cargo of provisions, clothing, bedding, guns, and mining tools, about 2,500 or 2,600 pounds in all. They had a rifle—a 30.30 Marlin smokeless, a shotgun, and two Colt revolvers, with

plenty of ammunition. About the 16th of May they reached Cape Lapin, on Unimak Island, pitched their tents, and began prospecting. They stayed there ten or twelve days. Then they went about 20 miles northeast up the Bering Sea, taking their outfit with them. There they pitched their tent and remained ten or twelve days. Not finding anything, they made up their minds to go back to Cape Lapin. So they took about half of the provisions and on the 6th of June came back. Three clothing sacks and three hand satchels contained the portion of the outfit which they brought back with them. *The rifle, shotgun, and revolvers were in this boat load.* In Jackson's satchel was a pin which figures in the testimony. Con Sullivan had a watch which he had on that day, and Florence Sullivan another watch, and Rooney another. These three watches figure in the case. They reached Cape Lapin about 11 o'clock and came ashore and unloaded, *put up their tent and put the goods in it*, had lunch, and started back for the balance of the stuff. They had expected to come back that night but the surf was bad. They had to carry their stuff about half a mile farther to get it on the boat, so they stayed over the night and the next morning started down for Cape Lapin. They got back the morning of the 7th. What occurred then is thus described by Jackson (R., p. 77):

> Next morning we started down for Cape Lapin. We got there about 11 or half-past 11 o'clock. When we were coming in, Rooney hollered, "There is two men going up the creek with packs." I looked around and only saw

one man; my back was to them. I was rowing. I only saw one man. Con was in the bow of the boat and hollered, "Pull in quick. The tent is down and everything gone." We pulled in quick, and found that there wasn't a thing left there. The tent was lying down, and we could see nothing. Three of us started up the creek in the direction we saw the men going.

I took across in this direction [indicating on the map], and Florence went to the cabin, and Con and I went on down this way, and he followed him. I wanted to go down here to see whether I could see a dory. I could see nothing.

Q. How long did you search there?

A. About half an hour. Me and Con came back, and we met Florence at the cabin; I should judge about here [indicating on the map] We had a talk among ourselves, and Florence said this little grip of theirs had valuable papers in it. I said, "Had you any money in it?" They said, "No." It was a great loss to them and was gone. (R., p. 78.)

* * * * *

We went quite a little ways up the creek. The next place we saw him (Florence Sullivan) was on this little island. Con says, "There's Florence." I looked around and saw him, and about a quarter of a minute after that the shooting commenced. (R., p. 87.)

We were on the other side of the creek, about 225 or 230 yards from where Florence was. Four shots went off and a man stood up from behind a rock. His back was to us and he saw

us and went on toward where we saw Florence, but he was gone. We did not know who would be shot next. We went down to the creek as fast as we could. When we got near the boat Rooney hollered, "Come on boys, let us get out to sea." He then started hollering about poor Florence. Then we ran to the boat and had hardly got our hands on it when a shot came and took Rooney in the leg somewhere. I said, "Drop behind the boat." They were firing into the boat.

Q. Did Rooney say anything at that time?

A. He hollered, "Oh, I am shot." We lay down behind the boat, and Con said, "We will have to make a break; we will be killed." I said, "We will have to do it quick." I had no more than said this when a bullet struck the boat. We got up, and both went toward the bluff. We had not gone more than 15 or 20 yards when Con got shot between the shoulders. He threw up his hands and hollered: "Oh, Lord! Oh, Lord!" as loud as he could. I went on, and the next shot I got it in the leg. I looked around and saw Con lying on the beach. Then I got around this point; the bullets were flying after me and I could hear them as they were hitting rocks behind me. I went as far as I could until the ocean cut me off. The sea comes in and I could go no farther. I stayed there until I saw Rooney coming around this point. I pulled out my handkerchief and waved to him to come to me. He kept coming on until he came to this little place where he lay down and

remained; he lay down and beckoned for me to come to him. I went over to him and he stayed on the outside and he wanted me to come in. He said "Owen, come in and lay down here." I says, "Pat, for God's sake pick up courage and let's try to get out of here." He said, "There is no use; we are going to be all killed." He says, "He is over there now searching Con's pockets." Then I begged him again for God's sake to pick up courage and come, but he shook his head. Then I made a break and started climbing the cliff. I climbed up this cliff and managed to get up it. There is a flat bench there and I stayed there until after Rooney was killed. I must have stayed in the top about twenty minutes, or probably about half an hour, when I heard two shots go off in quick succession again; it sounded so close it seemed to be right down under me where the shots were. When the second shots were fired I took off my gum boots and started off. I kept going day and night. I traveled all that evening, and the next day I struck a cabin about 11 o'clock the next night. The next morning when I was ready to start I saw four natives coming up; they were scattered; one was about a quarter of a mile across the river. I went in and bolted the door, and before long a couple came up and went to the cabin; one of them tried to open the door and found that the door was fast.

Jackson, supposing that these natives wanted to kill him, stood them off for twelve hours, writing in the meantime on a board behind the stove, the following:

WASHINGTON, SEATTLE.

OWEN JACKSON: The Indians killed Con Sullivan, Florence Sullivan, and Pat Rooney at Cape Lapin on June 5. I escaped. They have surrounded here.

OWEN JACKSON.

I wish you was here; you might help me. They took our things and then slaughtered us. We was prospectors.

He remained at the cabin three days. Then he went on toward False Pass and wandered about until the 24th of June, when he was picked up at Scott's camp. He testifies (R., p. 91) that he saw Con Sullivan with money at Seattle buying clothing and underwear, and saw Florence with money there. He did not see either have any money at Cape Lapin. There was no opportunity to spend money there. But he says he saw Con Sullivan sewing up a pocket he had in a vest and saw Florence Sullivan with a money belt when he stripped. The watches which Hardy had in his possession when he arrived at Scott's camp after the murder were all identified by Jackson, as well as the pin which was found on Hardy's person when he was arrested.

J. C. SCOTT, the head of Scott's camp, testified that George Aston arrived at his camp on the 7th of June, between 11 and 12 o'clock, and remained with the party until the 20th. Fred Hardy reached the camp on the

17th of June, between 9 and 10 o'clock at night. The next morning Hardy told him that he got off of the schooner *Arago* one day after Mr. Aston got off (R., p. 103). Hardy had with him two revolvers and a rifle of the description of those belonging to the Jackson party. The story Hardy told was set out in Scott's affidavit on the motion for a continuance (R., bottom p. 104). Aston was not at the camp when Hardy arrived, being at Cape Lazaress with Collinwood. Hardy asked Scott whether there was any money in the camp. He wanted to trade his money for gold. He took out his pocketbook and showed the money. He said he had about $1,200 (R., p. 105). Scott saw one of the watches that Hardy had and identified it (R., p. 107). He also said it looked as if he had watches in his upper vest pockets. On the 20th of June Hardy left with Aston to go to where he said the goods were.

Cecil Newton, a member of Scott's party, testified that Aston arrived at the camp on June 7, in a dory, with nothing but the clothes he had on. Hardy reached the camp June 17, stating he had been out five days and was hungry. Food was given him, but he did not eat very much—not like a hungry man. (R., p. 119.) Hardy told Newton substantially the same story about his coming ashore and being left, and finding a cabin with a dead man in it. (R., p. 120.) He said the Marlin rifle belonged to the captain, and the six-shooters he had aboard the ship. (R., p. 122.) Newton heard Hardy tell Aston that he had seen him go to nor'ward when he left, and wanted to go and

help him, but the captain would not let him, as he would run away. He did not go, and the next day he left the ship.

L. HANSON, a member of Scott's party, testified to Hardy's arrival and gave Hardy's story as follows (R., p. 128):

> He told us that him and the captain, and another man named Nelson, went ashore to hunt, and he said that the captain offered him $50 to get a bear. When he got ashore he went out to the hills and was late in getting back, and the captain had pulled out and left him. He said they lit a big fire and waited for a boat to come after them, but it did not come. He said that there was a cabin there, and it commenced to rain. It was locked; so he broke the door open and went in. When they got in there was a dead man's bones lying in a bunk; the meat was all eaten off. I said: How could anything get in it if the door was locked? He said there was a hole in the floor where the rats and foxes could get in. He said that he took and buried it, and he said that he went to bed and did not sleep much. He said his partner, Nelson, went out in the night and left him alone; so he left and came down to our camp. He said he was five days out and had nothing to eat. I believe the cook gave him something to eat when he got there that evening.

Hardy further stated that there was lots of stuff left in the cabin, provisions, blankets, and tobacco, and a double-barrel shotgun (R., p. 129).

G. H. COLLINWOOD, a member of Scott's party, testified to Hardy's arrival, and gave his story as follows (R., p. 140):

> He said that he came off the *Arago*, and that him and the captain came off of the *Arago* and went out hunting. They went up looking for bear and the captain had stayed behind, and that they went up and got back and the boat had gone and left them, so they stayed for the night; they found a cabin there.
>
> Q. Who stayed?
>
> A. Him and his partner.
>
> Q. Did he say what his name was?
>
> A. No, sir. He said that they found the cabin and broke it in and that a man was dead in the cabin, and they took him out and buried him. I said, "*Why did you bury that man without reporting it to the authorities?*" *and he did not answer the question.*
>
> Q. What did he say in reference to where he got the rifle?
>
> A. He did not say anything in reference to where he got the rifle, but he said that there was lots of things there. Plenty of grub and provisions, and he had found a fine shotgun which he had hid under the floor.

The testimony of GEORGE ASTON, who was a shipmate with Hardy on the *Arago*, and was with Hardy after he left Scott's party until he was arrested, occupies some 70 pages of the record (pp. 146 to 215). Aston was a seafaring man. He first saw Hardy in San Francisco, on the dock, a day or two before the *Arago* was towed into the stream. Thirty-six days

were consumed in the passage from San Francisco. On the 2d of June, Aston was caught out in a dory, fishing. Unable to get back to the vessel, he spent the night at sea, and the next day landed on Unimak Island. He spent the 3d and 4th with some natives in camp, the 5th and 6th in Charles Rosenberg's schooner. On the 7th he met the Scott party, with whom he remained until the 20th. On returning to Scott's camp on June 19, after a temporary absence, he found Hardy there. The following covers the conversations he had with Hardy at this time (R., p. 149):

> I asked Hardy concerning parties aboard the schooner *Arago* and made remarks upon how the fishermen were getting along; what success they had, and how the boys were feeling. I also asked Fred Hardy concerning the story I had heard in camp when I returned. Hardy told me that he had—I believe, to the best of my recollection, that he first told me that he found the articles of which he had spoken, and of which I heard he had spoken. He found them in a cabin, and he stated to me that they were not in a cabin, that they were in a tent. He also stated to me that he had asked the cook of the Scott party to accompany him to where they were. He also stated that he did not want the cook to go. He also asked me to accompany him to a point on Bering Sea.
>
> Q. Did he give any reason why he did not want the cook to go?
>
> A. Yes, sir; that he had found these articles in a tent and not in a cabin.
>
> Q. What else did he state there?

A. That he had money enough to help me and himself; that he wished me to accompany him to this point on Bering Sea and obtain possession of these goods; and he also asked me during the conversation to request Mr. Scott not to allow Smedley, the cook, to accompany us; he also stated that he did not; *that he wanted to get into civilization; he was tired of the life he had been leading*—possibly not in these exact words; he also displayed to me some money in a wallet, also some in a small buch bag; some of the money was in bills—at that time I could not discern the denomination; there was some silver in a small purse, the amount I did not note at that time.

Q. Did he state anything as to the amount of money that he had?

A. Yes, sir.

Q. What did he say?

A. He said he had $1,200; he also stated that, "*You know I did not have that money aboard the schooner; that I must have got it somewhere.*"

Q. What did he propose to do with this money, if anything?

A. *To get into civilization and start a saloon.*

Q. Did he say anything about taking you in with him?

A. Yes, sir.

Q. What did he say?

A. He asked me to go with him as partner—the exact words I can not get.

In accordance with Hardy's proposition, he and Aston left the Scott camp for the place where Hardy said he had found the goods. On the dory Hardy

gave Aston a Colt's six-shooter (R., p. 153), displayed three watches which he had (R., p. 153), counted his money ($694) (R., p. 154), and gave one of the watches to Aston (R., p. 154). Hardy piloted Aston back to where the goods were (R., pp. 155, 156, 157), showing in his conduct and conversation the consciousness of guilt. Finally they came to where the goods were (R., p. 158):

> We went on to the westward then, and came to a trail; we followed the trail across a ravine up onto another hill; *there was a little knoll there, which Fred said was his fort; he had stood guard there.*
>
> Q. Can you indicate where that knoll is on the map?
>
> A. It would be about along here; the ravine that I spoke of is about here. We went right close to the edge of the land, and Hardy told me he would show me a place from where we were looking down; he said that was his camp; he also asked me if I thought I could get down there; he also said that unless a person knew how to get down he would have a job finding out; he piloted me down all right; he had to go a little to the westward and down a rather steep bluff; there were a lot of rocks—a gravel beach; the land is formed into little bights there. Fred told me also that he was unable to get into the place where he had these goods placed, unless at low tide, without climbing over the rocks.

The cache is described on the next page (R., p. 159):

> There was in there a fixture formed of canvas and pieces of round wood. They were

> stayed with pieces of cod line of heavier quality than we used for fishing in the dories, and I believe there were four or six round uprights and around them, in the shape of a wall, was a piece of canvas. The thing was about 4 or 5 feet in height—about 4 feet in height, I should say. It was covered over the top with a piece of canvas and a rubber blanket. There was some cooking utensils hanging up on a nail on one of these boards; there was also a square tin, like a coal-oil can, and there was some boxes, and I believe there was some cups and knives and forks in it. There was some provisions in this place, but inside this shack there was some boards laid down on cross pieces under them. One end of the cross pieces rested on the ground or stones. There was some little pieces of boards laid down on top of these cross pieces and on top of them there was some bedding.

Packed in this place were the goods of the murdered men, which Aston identified (R., pp. 159 to 167), including a double-barreled shotgun (R., p. 167).

Hardy's story of how he came into possession of these goods appears on the next page (R., p. 168):

> He told me that he had found the goods that I saw in the cache some 3 or 4 miles to the westward of where the cache was, and that he had found the articles in a tent. If I remember rightly, he stated to me that the tent was pitched below the high-water line. I do not distinctly remember, but I believe that as far as my memory serves me, he also stated that he had placed some of the goods that were in this tent in a

dory, and that he had pulled the dory up as far as he could to the eastward, and that he had anchored the dory, had lost the anchor, and the dory came in contact with the rocks and got stove in. Whether it was the side or not, I could not be positive. He landed these goods that he had in the dory at this point designated as a cache that he had found immediately after landing there. He had smashed the dory up with an ax.

Another of Hardy's stories about how he came ashore appears on page 169. It is unnecessary to reprint it.

Hardy admitted that he had destroyed the valises and papers that were with the goods (R., pp. 170, 171), and stated that he had remained near the cache three or four days; "*that he had laid up behind a little knoll that was almost directly above the cache; that he had kept guard*" (R., p. 171).

What for, unless he was lying in wait for Jackson's return in order to wipe him out, too?

After they had spent one night at the cache, Aston left Hardy and went 4 or 5 miles to where he had left the dory. On his return he met Hardy (R., p. 172):

> Hardy had a rifle, and told me that he had about 60 rounds of ammunition; I do not distinctly remember whether we divided the ammunition; that part of the ammunition was rifle ammunition and part six-shooter ammunition.
>
> Q. What else was said?
>
> A. *I asked him what he was loading himself down for like a walking arsenal. He told me that*

he would not only have some goods but he would also have a schooner.

After staying at the cache some days Aston and Hardy left, taking with them the shotgun, some flour, bacon, and other articles (R., p. 174). They first stopped at the cabin of Charley Rosenberg, where Hardy got Aston to call him "Joe Cox." He didn't want Rosenberg to know who he was. Hardy tried to get Rosenberg to take them off the island (R., p. 176). The rifle and the shotgun were carefully wrapped up and secreted on the outside of this cabin (R., p. 179), where they were found afterwards by the officers (R., p. 180).

Apparently Hardy weakened about leaving the island with Rosenberg and Aston (R., p. 177). So, after staying a day or so with Rosenberg, the two left and proceeded on toward False Pass. Then they saw a schooner coming out of Marzovio and tried to flag her, but failed (R., p. 183). The next day they went to a fishing station belonging to the Alaska Cod-Fishing Company, where they obtained employment (R., p. 184), and remained until arrested by officers from the U. S. S. *Manning* (R., p. 186).

CHARLES ROSENBERG describes the visit of Hardy and Aston to his cabin (R., p. 217), and J. O'Sullivan gives an interesting account of the arrest of Hardy and his attempt to make away with one of the watches and the pin (R., p. 222). Five hundred and eighty-five dollars was found on Hardy's person (R., p. 227).

O'Sullivan was with the party and visited the scene of the murder. He says (R., p. 228):

> We got the bones of Rooney and buried them; and we dug up the bones supposed to be the bones of the Sullivan boys, and dug the grave deeper and buried them all together—the remains of the three; and then we went around searching for evidence. We got to the cabin there, and the cabin was broken down. It seemed to have been recently broken down.
>
> Q. Examine this map of that country and state whether or not it correctly gives the position of the coast along there—of the creek and of the Barabara.
>
> A. Well, I came up the creek there, and I—somewhere along here—I crossed the creek and came over and looked around. I was monkeying around somewhere in here. Then I struck on down and crossed the creek and went over this way and seen a barabara. It was right here. The door of the barabara was facing the bay here, and the roof was broken in. It looked like it had not been broken in long. I looked in and seen a three-quarter mattress there, apparently new. It was covered with dirt, and I pulled it up and did not find anything. I left the barabara and crossed the creek, a very small one. I came across like this, and there is a little knoll here. I went up there like this, and came on to the point of the hill overlooking the bay. This side is the opposite of the hill facing the bay. This is all sand-like. We came up here, I think, Lincoln Wahn, George King, and myself.

Q. What, if anything, did you find there?

A. *We found seven empty cartridges on the brow of the hill, in a very small space.*

Q. Within a radius of what space did you find these cartridges?

A. Well, within a radius of about not quite as large as this platform.

Q. You say that where you found these cartridges was right on the brow of the hill overlooking the creek?

A. *Overlooking the bay and overlooking everything. The most prominent point on the hill. It commanded the beach both ways.*

R. H. WHIPPLE, United States commissioner, gives an account of the visit to the scene of the murders, the burial of the bodies (R., p. 237), and the finding of the cartridges (R., p. 238); Hardy's sworn statement (R., p. 243), and his second statement (R., p. 245).

These were substantially all the witnesses for the Government.

The only witness for the defense was Hardy. His story appears in the record, pages 254 to 330. I shall not attempt to epitomize it. I trust the court will read it. It is enough in itself to convict Hardy, being packed with

"Lies, gross as a mountain, open, palpable."

Naturally, an attempt is made to drag Aston in, but it is a pitiable effort, calculated to deceive no one.

In rebuttal, William C. Bowen, Martin Tricker, Frank W. Lee, and Charles Schoemer, who happened to be employed on the U. S. S. *Manning*, then fortunately at Unalaska, and who had formerly been soldiers,

all testified that they had known Hardy, that he was a private soldier, and three of them identified him as a prisoner known as "Diamond Dick," who was confined at the military prison at Alcatraz at the time they were there, and who was discharged from that prison about the last of March.

Collinwood, Scott, Aston, Newton, Hanson, and Nosiakof all gave testimony respecting Aston's whereabouts covering the time between the 3d of June and the 19th of June (the day Hardy arrived at Scott's camp), showing the utter falsity of Hardy's story that he had met Aston and three men at Rosenberg's cabin upon landing from the *Arago* about the 10th of June. (R., p. 263.)

ASSIGNMENTS OF ERROR.

1. *That the court erred in overruling a motion for a continuance.* I have already discussed this assignment.

2. *The court erred in permitting one Kehoe to be excused for cause upon the application of the Government* (R., p. 28).

Kehoe stated first that he had formed an opinion with respect to the guilt or innocence of the accused. For this he was challenged for cause by the defense. In view of the fact, however, that he stated he could disregard the opinion and try the case upon the law and the evidence, the challenge of the defense was overruled. Afterwards it came out that he had conscientious scruples with respect to rendering a verdict where the penalty is death, on circumstantial evidence. For this reason he was challenged by the Government and the challenge sustained.

He would not have made a proper juror under the circumstances.

3. *The court erred in not excusing one L. D. McLean as a juror for cause upon the application of the defendant.* (R., p. 32.)

McLean, who resided in Nome, stated that he had read what purported to be an account of the murder in the papers at Nome, and formed an opinion which it would require evidence to remove. For this he was challenged by the defense. The challenge was denied, because he stated he had not discussed the case with any person who claimed to be acquainted with the facts, did not know whether the newspaper statement purported to be the facts or not, and, if sworn and accepted as a juror, believed he could disregard the slight opinion he had and try the defendant fairly and impartially upon the law and the evidence.

4, 5, 6. These assignments are based upon the court permitting the Government to ask certain jurors (Hayden, R., p. 47; Johnson, R., pp. 48, 49) the following question: "*Have you any such conscientious scruples or opinions as would prevent or preclude you from rendering a verdict of guilty where the penalty prescribed by law is death, upon what is known as circumstantial evidence?*"

Obviously, it is ground of challenge for cause if a juror states that he has conscientious scruples against rendering a verdict in a capital case upon circumstantial evidence, and therefore a question which is intended to elicit the condition of the juror's mind upon this point is entirely competent.

7, 8. *The court erred in permitting the witness Jackson to answer the following question: "Mr. Jackson, you wrote on there 'June 5.' Why was that?"* (R., p. 89.)

Jackson had testified that the murders took place on June 7. After escaping, he had traveled all night and all the next day, and the next night about 11 o'clock he reached a deserted cabin. There he spent the night. The next morning he saw four natives approaching. He locked himself in. One of the natives tried to open the door. He kept them out in the belief they intended to murder him. Under these circumstances and expecting death he wrote the following statement:

> WASHINGTON, SEATTLE.
>
> OWEN JACKSON: The Indians killed Con Sullivan, Florence Sullivan, and Pat Rooney, at Cape Lapin on June 5. I escaped. They have surrounded here.
>
> OWEN JACKSON.
>
> I wish you was here; you might help me. They took our things and then slaughtered us. We was prospectors. [R., p. 89.]

The question was put to elicit Jackson's state of mind and thus explain how he came to write "June 5" instead of "June 7." The answer is at top of page 90: "I was shaking all over. I was doing my best to make a mark down. I did not know but what I would be killed any minute."

9. The court erred in permitting the witness Jackson to answer the following question: "*What was the condition of your hands and feet when you got on the top of the bluff there?*"

Jackson had been describing his escape from the fate of his comrades by climbing a steep cliff, stopping on a bench halfway up and removing his rubber boots. The condition of his hands and feet when he got to the top of the cliff was material because it threw light upon the transaction. It indicated more plainly than any description he could give the difficulties of the ascent of the cliff and the frightful struggle he had to save his life. The murderer believed that he had the entire party in a trap, penned between the sea and the cliff, so that he could dispose of all of them. He had selected a commanding point where, with his rifle, he could pick them off one after another. By a mere chance Jackson escaped. He reached the top in his socks; he had to pull off his gum boots halfway up. And as for his hands, he says: "*Most of the flesh was torn off my fingers when I got up.*"

10. The court erred in permitting the witness Jackson to answer the following question: "*How long did you continue to wear your socks?*"

But the court did no such thing. The court sustained the defendant's objection to this question (R., p. 93).

11. The court erred in permitting the witness Newton to answer the following question: "*Might it not be on the 19th day of June?*" (R., p. 126).

On his redirect examination Newton was asked whether he was certain that Aston arrived on the 18th day of June from Lazareff. He answered, "Yes, sir."

Then he was asked, "Might it not be on the 19th of June?" When the objection to this was overruled, he answered, "No; it couldn't have been on the 19th. It wasn't on the 19th."

The question was objected to as leading. Obviously, it was not leading. It was simply intended to test the certainty of the witness's recollection, which was entirely proper. He stood by what he had said (R., p. 126).

12. The court erred in permitting the witness, Aston, to answer the following question: "*Did you ever see him have a watch while he was aboard the 'Arago'?*"

Aston had just been telling about Hardy arriving at Scott's camp with the rifle and revolvers and watches, which were subsequently identified as the property of the murdered men. Hardy had been on the same schooner with Aston for some six weeks. It was of course material to know whether Hardy had had these watches when he was on board the schooner, and so the question was put. Would it not have been material for Hardy to show that some one had seen the watches in his possession while he was on board the schooner? (R., p. 151.)

13. The court erred in permitting the witness Aston to answer the following question: "*You had no time to get any of these things in your dory, did you?*"

While counsel for defendant objected to this question as leading, it is distinctly stated that *there was no ruling*, and consequently no exception, nor any answer that seemed to be germane to the inquiry. The only

answer made was, "The dory which I had was never so far westward as the cache." Aston had been telling how they had put away in the cache preparatory to their leaving the last time the most of the goods, and that he had told Hardy that they ought not to take anything except what they actually needed, for instance, in the way of food. Then came the question objected to, and subsequently the statement that the dory was never so far westward as the cache; that they both tried to get the dory off the beach but gave it up, and left the cache for good (R., p. 174).

14. The court erred in permitting the witness, Aston, to answer the following question: "*How did you expect to carry those provisions from the cache to Scott's camp?*"

Aston had just stated that, along with Hardy, he went to the cache with the dory to get some provisions, blankets, and clothing. Then came the question objected to, "How did you expect to carry these provisions from the cache to Scott's camp?" The question was, perhaps, unnecessary, and the answer inevitable, namely, "In a dory." Really, these questions were simply preliminary. They led up to the next question, "Why did you not use the dory?" That was not objected to, and the answer was, "On account of the water and the weather, and what I considered suspicious circumstances concerning the place and position of the goods, and also on account of the actions of Mr. Hardy, and also on account of Mr. Hardy's own request." (R., p. 213.)

15. *The court erred in permitting the Government to introduce in evidence the statement made by Hardy to Whipple;* and

16. *The court erred in permitting Whipple to testify as to the statement made to him by Hardy while in jail.*

The conditions under which the first statement of Hardy was made are described by Commissioner Whipple. (R., pp. 240 to 243.) The statement was not made under the statute or as a part of the preliminary hearing. It was taken because Hardy insisted upon making it, although Whipple distinctly told him he was entitled to counsel, that he was under no obligation, that he need not make the statement unless he so desired, and that whatever statement he made would be used against him at the trial. (R., p. 240.)

The second statement was made at the jail, after Hardy had been committed. The commissioner had been informed by one of the men at the jail that Hardy wanted to talk with him. He told the person that he could bring Hardy in if he wanted to talk with him. This was done, and Hardy informed him that he desired to talk about the case. Then he went on to say that his former statements were untrue, and he told another story about how he came to leave the *Arago* and what happened afterwards. (R., p. 245.) Obviously it was perfectly proper to allow this statement to go in. The statement was entirely voluntary.

18. *The court erred in permitting the witness Whipple and other witnesses to testify on behalf of the Government whose names were not indorsed on the indictment.*

But Whipple's name *was indorsed* on the indictment (R., p. 370), and who the other witnesses referred to are does not appear.

17, 19, 21, 22. These assignments are based upon the action of the court in permitting Martin Tricker (R., p. 336), William C. Bowen (R., p. 332), Frank W. Lee (R., p. 339), and Charles Schoemer (R., p. 341) to testify on rebuttal that they knew Hardy when he was serving his sentence as a private soldier in the military prison at Alcatraz.

I think all these witnesses fortunately happened to be employed on the U. S. S. *Manning*. Their testimony enabled the prosecutor to explode Hardy's story that he had been paid $1,875.75 by Major Whitney on the 28th of March and had been honorably discharged as an officer in the United States Army. If there is any rule that prevents the Government from demonstrating the falsity of a defendant's story by the use of witnesses who were not before the grand jury, and whose names were not on the indictment, because it was not known then that their testimony would be material, I am unacquainted with it. The view the court took of this objection appears on the record, page 333.

20. The court erred in permitting the witness, Bowen, to answer the following question: "*Are you positive that the defendant here is the same person that you saw at Alcatraz?*"

Bowen was introduced as a witness for the purpose of identifying Hardy as a man who was in prison at Alcatraz while Bowen was there, and it was entirely

proper for counsel to place the degree of certainty with which the witness spoke. The witness was positive, and so stated in answer to the question. (R., p. 335.)

23. The court erred in permitting the witness Hanson to answer the following question: "*When did you first see George Aston?*"

Hanson belonged to Scott's party. It was material to show in rebuttal that Hardy's tale about having met Aston with the two men directly after he deserted from the schooner was untrue. If Aston was at Scott's camp on the 7th of June he couldn't have been where Hardy swore he was (R., p. 352).

The nine concluding assignments (24 to 32, inclusive) are general and formal, based on the overruling of the motion for a new trial and the denial of the motion in arrest of judgment, and, in the absence of a brief on the other side, present nothing specific for discussion.

JUDGE WICKERSHAM, who tried the case, and was liberal to Hardy in all of his rulings, on sentencing him, said (R., p. 358):

> The court has nothing whatever to do with fixing the punishment, but that you, and the twelve citizens who tried you as jurors, may be satisfied that the court feels as they do in the matter, the court says now, that *after listening to the evidence carefully and patiently, I am satisfied, as a juror ought to be, that you are guilty of murder in the first degree* for the killing of one Con Sullivan at the time and place mentioned in the indictment. The verdict of the jury

agrees with my own judgment, and my conscience would be clear, if I had been a juror, in reaching the same verdict which they reached in your case.

JOHN K. RICHARDS,
Solicitor-General.

APRIL 24, 1902.

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